

LRC Research Training

Contract Drafting Summer 2020

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Finding sample contracts & guidance



A common scenario:

- You are asked to draft a brand new contract or clause
- You have never written a contract like the one you have been asked to draft
- You might be tempted:



Finding sample contracts & guidance



Your client—a local cleaning company—is planning to offer on-demand disinfecting services via a new mobile app. To that end, they've identified a software developer they'd like to hire as an independent contractor to write the program. They've asked you to draft the terms of this agreement.

You've never written such a contract before and don't know how to get started.

Where to begin?

You get what you pay for



Issues to think about

- Author/creator
- Age of materials
- Contract style/clauses
- Content
- Industry
- Guidance/analysis

Fee-based sources of forms/sample contracts and guidance

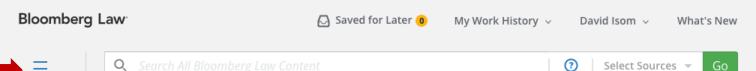
- Bloomberg Law (forms & analysis)
- Lexis Practice Advisor (forms & analysis)
- Thomson Reuters (Westlaw)—
 Practical Law (forms & analysis)
- CEB Pro (CA-specific; forms & analysis)
- Other fee-based legal websites (often include forms only)

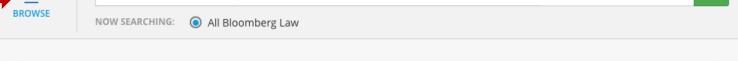
Quality free sources

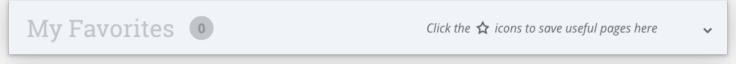
- State websites have free forms (but no analysis)
- Print books at the LRC (and other law libraries) have forms and analysis

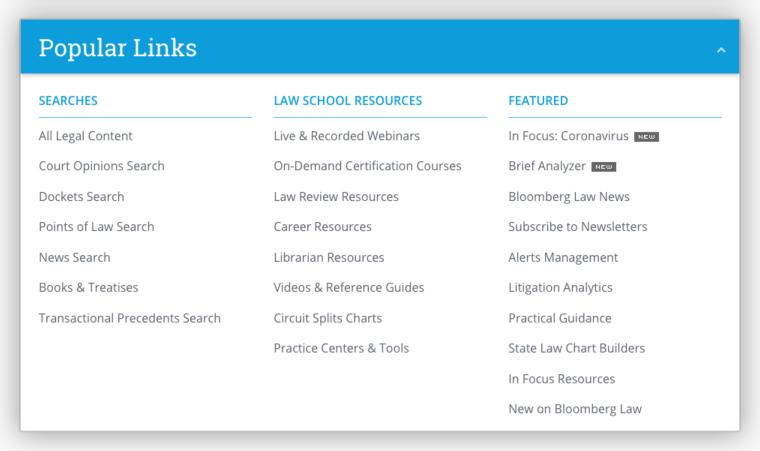


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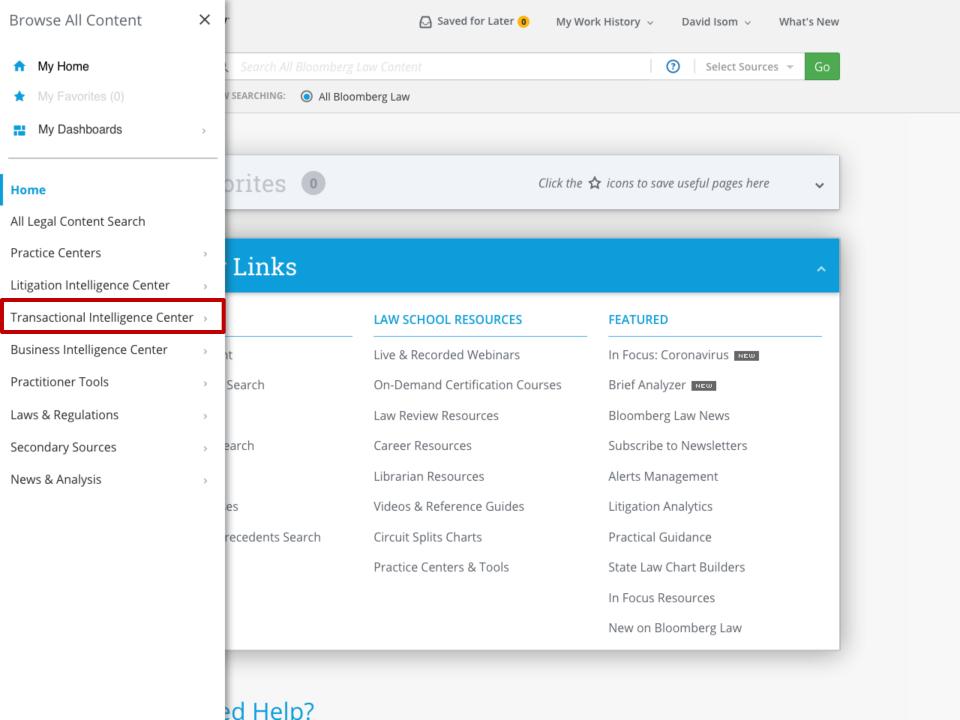


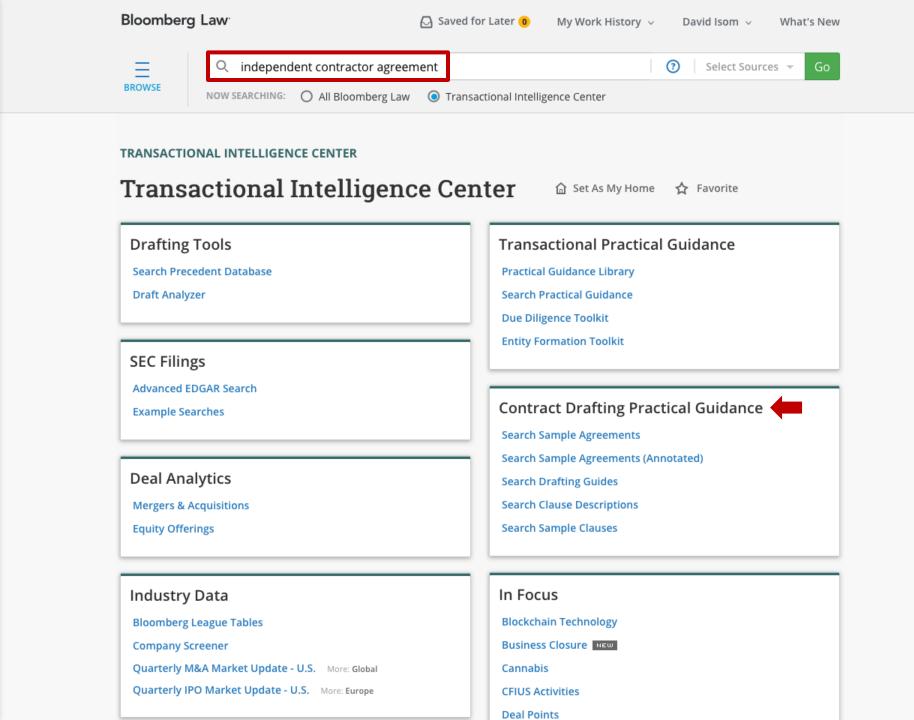


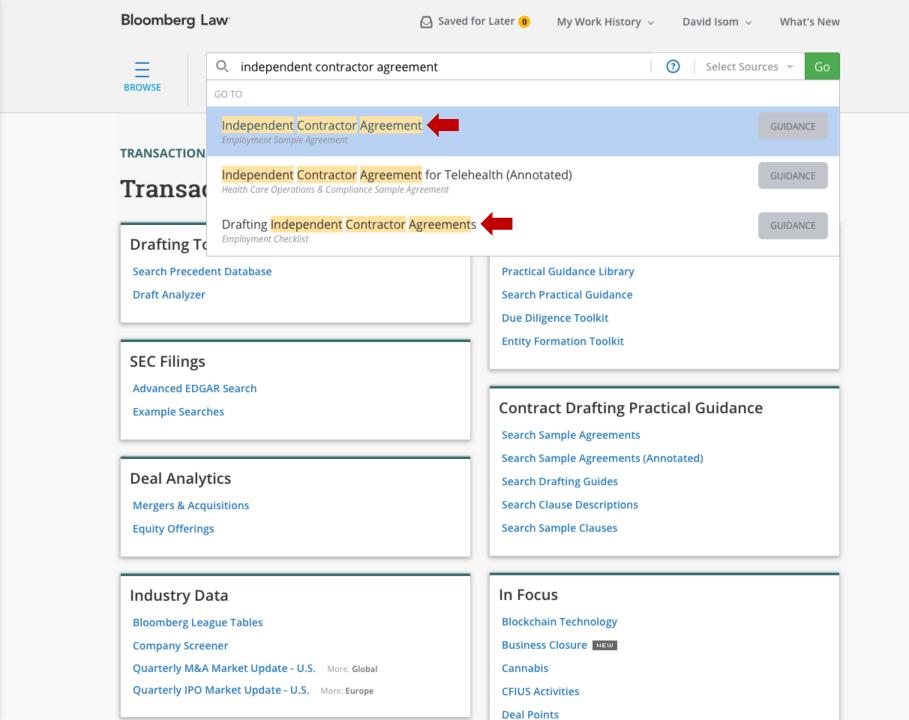








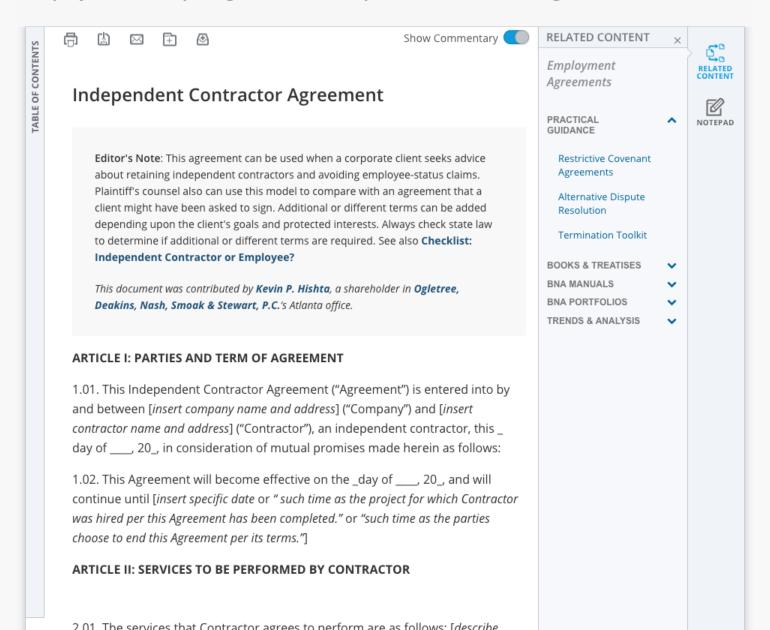




PRACTICAL GUIDANCE

Practical Guidance A Favorite

Employment, Sample Agreement - Independent Contractor Agreement



PRACTICAL GUIDANCE

Practical Guidance A Favorite

Employment, Checklist - Drafting Independent Contractor Agreements

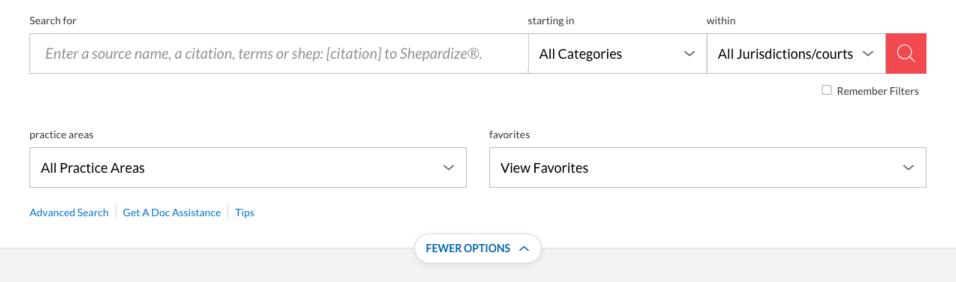
RELATED CONTENT Show Commentary TABLE OF CONTENTS Fair Labor Standards RELATED Act **Drafting Independent Contractor Agreements** PRACTICAL NOTEPAD GUIDANCE Editor's Note: Contractual provisions included in an independent contractor Wages & Overtime agreement are highly fact sensitive and ultimately depend on the nature of the Breaks & Schedules services being provided. A specific kind of clause for one type of service may be a strong indication of employment status, while in another it may not necessarily **BOOKS & TREATISES** compromise independent contractor status. Corporate counsel can utilize this **BNA MANUALS** checklist to determine how courts and administrative agencies have or may LAWS & review certain clauses in independent contractor agreements. This checklist isn't REGULATIONS intended to comply with the laws of any specific jurisdiction, but rather give a AGENCY GUIDANCE broader perspective on how certain contractual clauses would likely affect the **DECISIONS &** defensibility of independent contractor status. In all cases, there is no single RULINGS factor that is dispositive and the entire agreement, as a whole, along with the CHART BUILDERS actual control exercised by the hiring entity, is reviewed in the analysis. QUICK REFERENCE TRENDS & ANALYSIS Contributed by John Ho, of Cozen O'Connor. Variations in Factors by Jurisdiction ☐ Jurisdictions often use different tests when determining independent contractor status, which further complicates the issue. It is critical that counsel examine the specific jurisdiction's laws to determine the specific factors and elements that need to be considered. State/Local Rules and Laws o For example: New York City has legislation called the Freelance Isn't Free Act, which governs the content of independent contractor agreements.



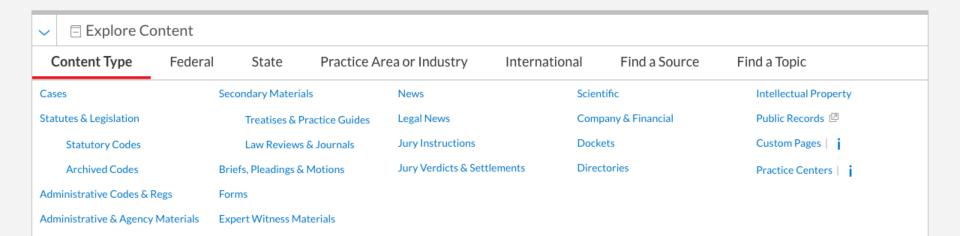
LEXIS PRACTICE ADVISOR

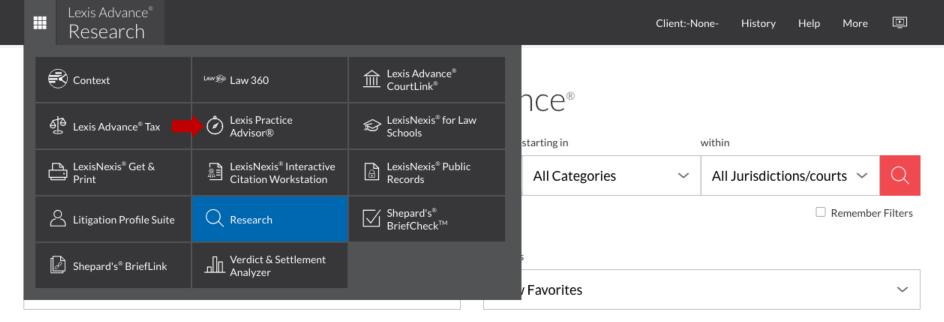


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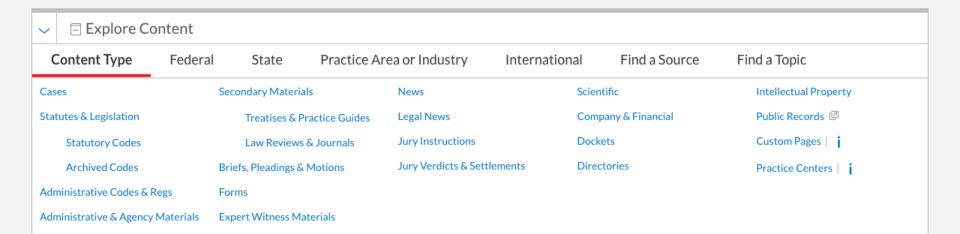




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Corporate and M&A				Private Equity & Investment Management
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Results for: independent contractor agreement | Actions >

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Arizona	23
∨ More	
Select multiple	

Practice Notes (927)



Sort by: Relevance

1. Independent Contractor Classification Audits and Reclassifying Employees and Independent Contractors

... independent contractor agreements, see Independent Contractor Agreements: Major Negotiation, Drafting, and Legal Issues. For an annotated sample agreement, see Independent Contractor Agreement (Pro-Service Recipient). Review Benefits Plans Be sure that all of the employer's plans clearly and uniformly define the term "employee" so that it excludes independent contractors, and workers who were misclassified as independent contractors, from eligibility and participation. Assess the Employee Handbook ...

Independent Contractor Resource Kit

... Independent Contractor Resource Kit This resource kit provides links to non-jurisdictional and state-specific practical guidance on independent contractors. It includes Lexis Practice Advisor practice notes, annotated forms, and checklists. This resource kit provides links to non-jurisdictional and state-specific practical guidance on independent contractors. It includes Lexis Practice Advisor practice notes, annotated forms, and checklists. Independent Contractor General Guidance The following ...

3. Independent Contractor Classification Training Presentation

... Independent Contractor Tests and Risks of Worker Misclassification, Independent Contractor Classification Audits and Reclassifying Employees and Independent Contractors, and Independent Contractor and Employee Classification: Special Tax Issues. See also Independent Contractor Status Maintenance Checklist. For guidance on Independent Contractor agreements, see Independent Contractor Agreements: Major Negotiation, Drafting, and Legal Issues. For information on state laws concerning Independent

4. Independent Contractor Agreements: Major Negotiation, Drafting, and Legal Issues

... independent contractors through the normal payroll mechanism using company time sheets or standard salary mechanisms. Rather than time sheets, the independent contractor should submit an invoice, including a business name, if applicable, and an Employer Identification Number, or other business or tax identification numbers. And the company should pay the independent contractor as it would other vendors. Companies can also use incentive pay to show shared risk and reward. For example, early-completion ...

5. Independent Contractor and Employee Classification: Special Tax Issues

Relevance

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>	Real Estate Topics		
>	Labor & Employment Topics		
>	Employee Benefits & Executive Compensation Topics		
>	Commercial Transactions		
	Lexis [®] Smart Forms		

Forms (1,117) Sort by: 1. Independent Contractor Status Questionnaire (FLSA)

... Independent Contractor Status Questionnaire (FLSA) This Independent Contractor Status Questionnaire provides guidance for assessing whether a worker is an independent contractor or employee under the federal Fair Labor Standards Act (FLSA). It contains practical guidance and drafting notes. This form is intended for private employers. It is based on factors recognized by the Department of Labor under the so-called economic realities test for purposes of FLSA compliance. These are substantially similar ...

2. Independent Contractor Agreement (Pro-service Recipient) (CO)

... Independent Contractor Agreement (Pro-service Recipient) (CO) This form is an Independent Contractor Agreement between an independent contractor and the party for whom the independent contractor will perform specified services in Colorado. This form contains practical guidance, drafting notes, alternate clauses and optional clauses. This form is intended for private employers. Its language has been customized to comply with Colorado and federal law. As a result, the text of this form differs from ...

Form Type LPA Authored Forms

Form Type

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3. Independent Contractor Agreement (Pro-service Recipient) (LA)

... Independent Contractor Agreement (Pro-service Recipient) (LA) This form is an Independent Contractor Agreement between an independent contractor and the party for whom the independent contractor will perform specified services in Louisiana. This form contains practical guidance, drafting notes, alternate clauses and optional clauses. This form is intended for private employers. Its language has been customized to comply with Louisiana and federal law. As a result, the text of this form differs from ...

Form Type LPA Authored Forms

4. Independent Contractor Agreement (Pro-service Recipient) (NC)

... Independent Contractor Agreement (Pro-service Recipient) (NC) This form is an Independent Contractor Agreement between an independent contractor and the party for whom the independent contractor will perform specified services in North Carolina. This form contains practical guidance, drafting notes, alternate clauses and optional clauses. This form is intended for private employers. Its language has been customized to comply with North Carolina and federal law. As a result, the text of this form ...

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5. Independent Contractor Agreement (Pro-service Recipient) (TN)

Relevance

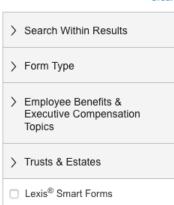
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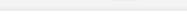


Narrow By



Clear





Smart Form 1

□ 1. Independent Contractor Agreement (Pro-service Recipient) (CA)



... Independent Contractor Agreement (Pro-service Recipient) (CA) This form is an Independent Contractor Agreement between an independent contractor and the party for whom the independent contractor will perform specified services in California. This form includes practical guidance, drafting notes, alternate clauses, and optional clauses. This form is intended for private employers. Its language has been customized to comply with California and federal law. As a result, the text of this form differs ...

Form Type LPA Authored Forms

2. Exclusive Recording Agreement

... agreements heretofore made between them with respect to the subject matter hereof are merged in this Agreement, which fully and completely expresses their agreement with respect to the subject matter hereof and (b) except as specifically set forth herein, all prior agreements among the parties with respect to such subject matter are superseded by this Agreement which integrates all promises, agreements, conditions and understandings among the parties with respect to such subject matter. In addition, ...

Form Type LPA Authored Forms

□ 3. Personal Management Agreement

If any provision of this **Agreement** is determined invalid, illegal or unenforceable, then that determination will not affect the validity of the remaining provisions hereof; provided, however, that if any such invalidity, illegality, or unenforceability materially affects the Manager's right to receive compensation hereunder, Manager shall be entitled to the reasonable value of Manager's services and to retain all compensation paid to Manager hereunder as a payment toward the reasonable value of ...

Form Type LPA Authored Forms

☐ 4. Services Agreement (Pro-services Recipient) (CA)

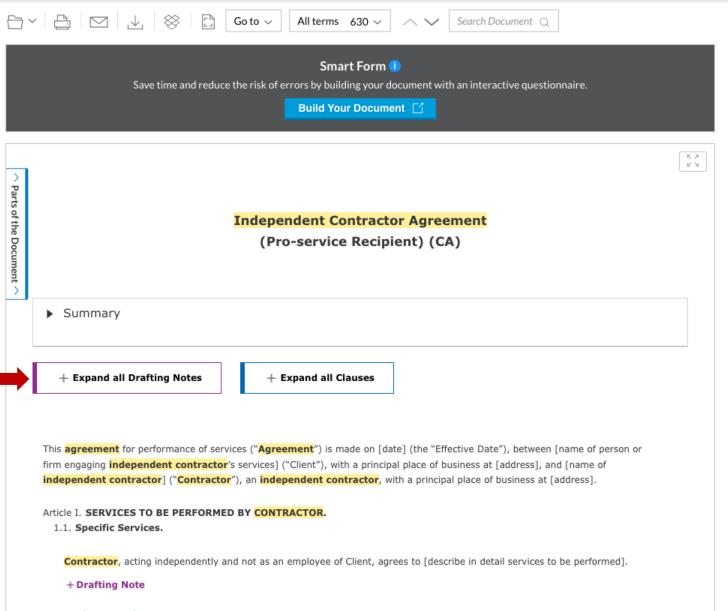
... AGREEMENT This Services Agreement ("Agreement") is made on [date] (the "Effective Date") between [name of party receiving the services] ("Customer"), with offices located at [address] and [name of service provider] ("Service Provider") with offices located at [address]. The Customer and Service Provider are sometimes collectively referred to herein as the "Parties" and individually as a "Party". Customer wishes to retain the services (collectively the "Services" as defined below) of the ...

Form Type LPA Authored Forms

5. Agreement for Environmental Site Assessment Services (CA)

Document: Independent Contractor Agreement (Pro-service Recipient) (CA) | Actions

Home / Commercial Transactions / Supply of Goods and Services / Services Agreements / Document



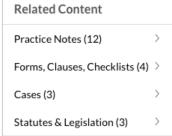
About This Document

Open form in Word

Drafting Notes

Alternate & Optional Clauses

Current as of: 04/07/2020



Document: Independent Contractor Agreement (Pro-service Recipient) (CA) | Actions





Independent Contractor Agreement (Pro-service Recipient) (CA)

Drafting Notes

Drafting Note to First Paragraph of Specific Services

The best agreements cover a specific project. If a Contractor is going to work on different projects upon completion of an initial assignment, then those should be outlined in a separate agreement. The more projects a Contractor works on or the longer the engagement, the more the Contractor is likely acting as an employee. The Services can also be set forth in an attachment to the Agreement, as provided in the Alternate Clause to Section 1.01. However, before drafting the Independent Contractor Agreement, you should analyze the issue of Independent contractor status under the various federal and state law tests to ensure your agreement adequately supports an Independent contractor classification, and minimize the possibility that a court or administrative agency would recharacterize the worker as an employee.

For more information, see Independent Contractor Tests and Risks of Worker Misclassification, Independent Contractor and Employee Classification: Special Tax Issues, and Independent Contractor Agreements: Major Negotiation, Drafting, and Legal Issues.

For more information on California's **independent contractor** laws and classification issues, see **Independent Contractors** State Practice

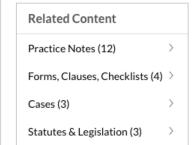
Notes Chart. For state-specific **independent contractor agreement** forms, see the **Independent Contractors** and Interns column of <u>Wage</u> and Hour State Expert Forms Chart.

Drafting Note to First Paragraph of Method of Performing Services

A key test of a proper service **agreement** is that the Client does not have control over the methods by which the result is accomplished. Thus, this form expressly vests control of the method, details, and means of performing the services in the **independent contractor**. The parties should ensure that the **Agreement** is for legitimate services and is not an effort to willfully misclassify an employee as an **independent contractor** as determined by the California Department of Industrial Relations (DIR).

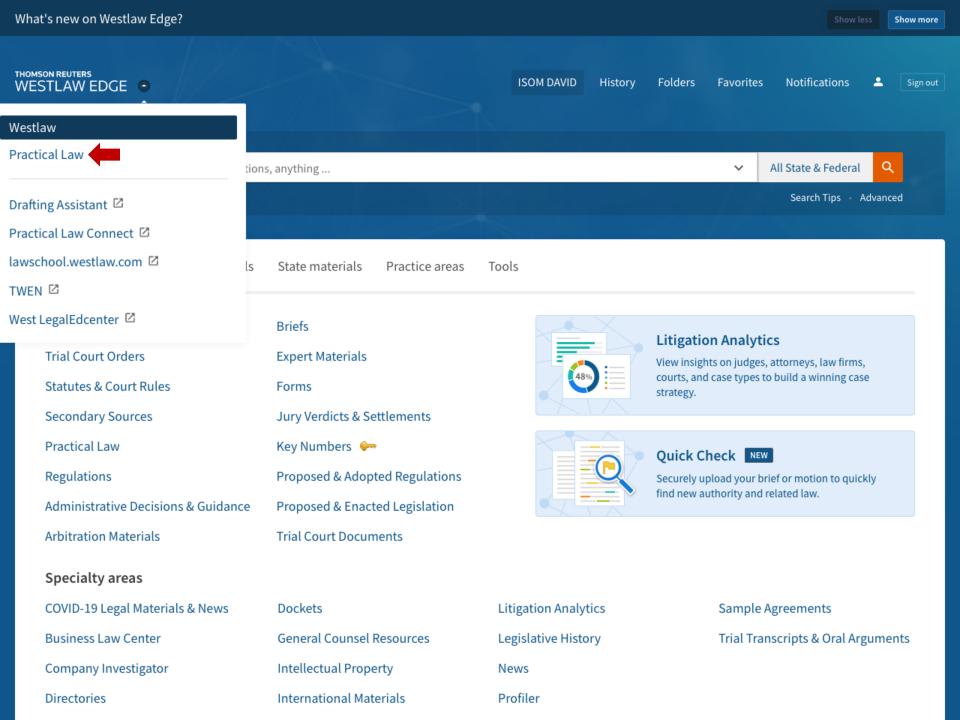
California law presumes that a worker is an employee unless that worker satisfies the **independent contractor** requirements. Effective January 1, 2020, California Assembly Bill 5 (AB 5) prescribes an "ABC test" to determine whether a worker is an employee for purposes of the California Labor Code, the California Unemployment Insurance Code, and the California Industrial Welfare Commission Wage Orders. See Cal. Lab. Code § 2750.3 (effective Jan. 1, 2020); Cal. Unemp. Ins. § 621 (effective Jan. 1, 2020); 2018 Cal AB 5. Under the ABC test, a worker is an **independent contractor** if the following conditions describe the relationship between the business and the worker:

(A) The worker is free from the control and direction of the business, both under the contract and in the actual performance of the work.





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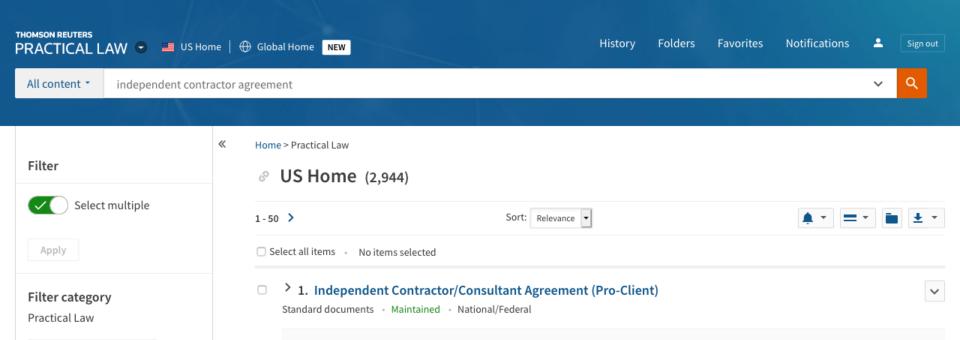
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An independent contractor agreement between an individual contractor and a client company for consulting or other services. This Standard Document is drafted in favor of the client company and is based on federal law. State and local law may impose different or additional requirements on independent contractor classification and agreements. For...

...State and local law may impose different or additional requirements, including language that must be included in **independent contractor agreements**. Companies engaging **independent contractors** should consider applicable state and local law with this Standard Document. For more information on state law requirements for **independent contractors**, see **Independent Contractors**: State Q&A Tool and **Independent Contractor**...

...Independent contractors can provide a significant financial benefit to a company in part because independent contractors are not entitled to many of the rights and protections available to employees (see Practice Note, Independent Contractor Classification: Benefits of Engaging Independent Contractors). This is also the reason, however, that the DOL, the IRS, state and local agencies, and the courts often construe independent contractor...

> 2. Independent Contractor/Consultant Agreement (Pro-Client) (CA)

A California-compliant independent contractor agreement between an independent contractor (a self-employed individual) and a client company for consulting or other services. This Standard Document is drafted in favor of the client company. This Standard Document has integrated notes with important explanations and drafting tips.



Independent Contractor/Consultant Agreement (Pro-Client) (CA) California

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READ THIS BEFORE USING DOCUMENT

This independent contractor or consultant agreement is a short-form letter agreement between an individual independent contractor and a client (assumed to be a corporate entity in this document) for consulting or other services. It is drafted in an informal letter format and may be appropriate for a short-term engagement or specific project.

This Standard Document assumes that the service provider is properly classified as an **independent contractor** and is not an employee of the client company. Companies must be aware of A.B. 5, effective January 1, 2020, which requires compliance with the onerous "ABC" test for most **independent contractor** relationships to be valid (see Drafting Note, A.B. 5 Codifies and Extends Dynamex's ABC Test and Practice Note, Legal Tests for **Independent Contractor** Classification Under California Law). This Standard Document also assumes that the **independent contractor** is not a labor **contractor** providing workers to the client employer to perform labor that is within the usual course of the client employer's business, which would subject the labor **contractor** and client employer to the requirements of Section 2810.3 of the California Labor Code (for more information, see Legal Update, California Law to Make Companies Liable for Employment Violations of **Independent** Labor **Contractors**).

This Standard Document is intended for the engagement of an individual independent contractor. The individual may have organized their business as a sole proprietorship or limited liability company (LLC), for example, and may have hired or engaged employees or contractors to assist in providing

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Independent Contractor/Consultant Agreement (Pro-Client) (CA) California

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[INDEPENDENT CONTRACTOR NAME]

[ADDRESS LINE 1]

[ADDRESS LINE 2]

[DATE]

Dear [INDEPENDENT CONTRACTOR NAME],

This letter agreement (this "Agreement") sets forth the terms and conditions whereby you agree to provide certain services (as described in Schedule 1) to [CLIENT COMPANY NAME], with offices located at [ADDRESS], a [STATE OF ORGANIZATION] [ENTITY TYPE] (the "Company").

Services.

- 1.1 The Company engages you, and you accept such engagement, as an independent contractor to provide certain services to the Company on the terms and conditions set forth in this Agreement.
 - 1.2 You shall provide to the Company the services listed on Schedule 1 (the "Services").
- 1.3 The Company shall not control or direct the manner or means by which you [or your employees or contractors perform the Services, including but not limited to, the time and place you perform the Services]. [The Services performed are outside the usual course of the Company's business.] [You are customarily engaged in an independently established trade, occupation, or business of the same nature as the Services performed.]
- 1.4 Unless otherwise stated on Schedule 1, you shall furnish, at your own expense, the materials, equipment, supplies, and other resources necessary to perform the Services. [The Company shall provide you with access to its premises, materials, information, and systems to the extent necessary for the performance of the Services.]
- 1.5 You shall comply with all [third-party access] rules and procedures communicated to you in writing by the Company, including those related to safety, security, and confidentiality.





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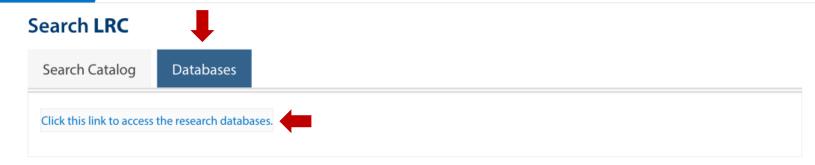








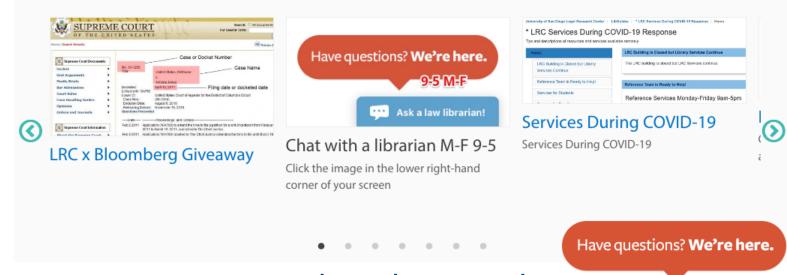
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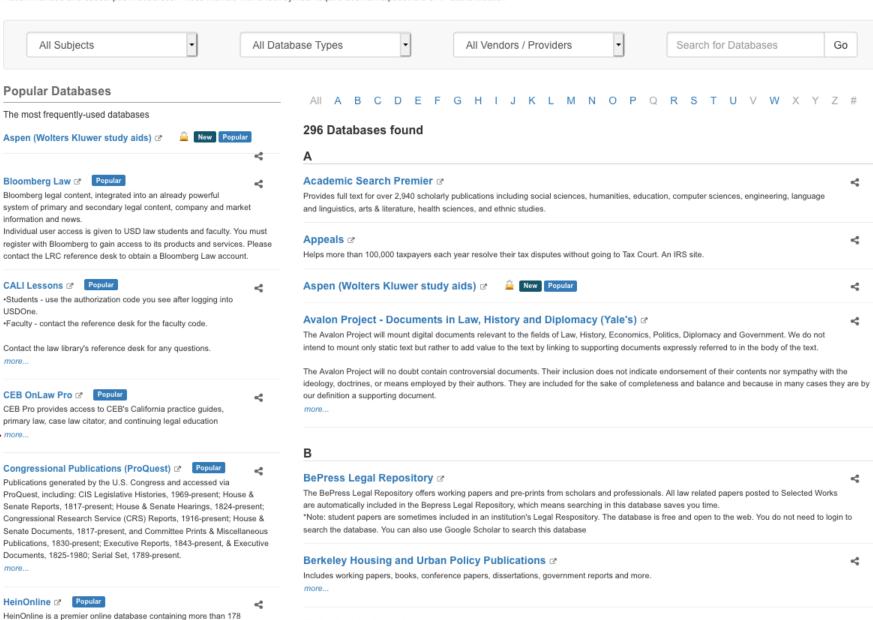


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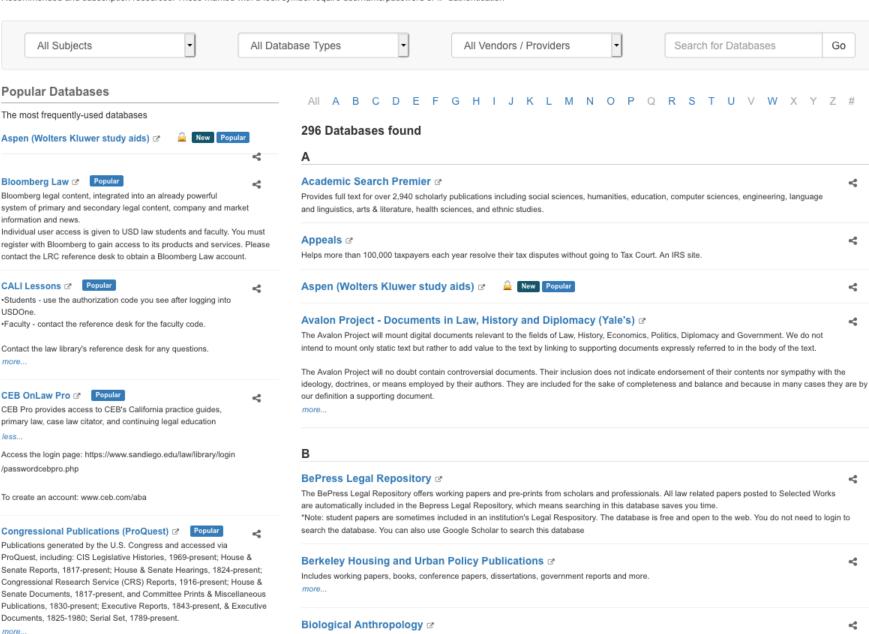
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Creditors, Brace for Impact?

David Muellenhoff June 02, 2020

Creditors must make a number of tactical decisions when proceeding against California debtors. When seeking to levy against a debtor's property, for example, the creditor may have to consider whether the property is community property of the judgment debtor and spouse, or property in which the judgment...

Tips for Dealing with a Difficult Deponent

Julie Brook June 01, 2020

If you take depositions, it's inevitable that you'll encounter deponents who are difficult to question. In addition to staying professional, consider using one or more of the following strategies, based on the difficulty you're facing. The confused witness. This kind of witness typically responds to...





Appellate Court Limits Ability to Reform Will to Validate Intended Appointment of Trust Property

Bruce A. Last June 01, 2020

California Prosecutors Call on State Bar to Prevent Political Endorsements and Contributions for Prosecutors from Law Enforcement Unions

Paul Myslin June 02, 2020

A coalition of current and former elected prosecutors sent a letter to the State Bar of California on Monday calling for a new rule of professional responsibility for prosecutors. Signed by Diana Becton (Contra Costa), Chesa Boudin (San Francisco), Tori Verber Salazar (San Joaquin), and George Gascón...

Excessive Force Claim Allowed Following Conviction for Disturbing the Peace, Second District Holds

David Saunders June 01, 2020

California's Second District Court of Appeal held Monday that a plaintiff could sue the police in civil court for excessive force after having been convicted of disturbing the peace, because the past conviction didn't establish the police officer used only reasonable force. In this case the plaintiff,...

Judicial Council Amends
Emergency Rule on Statutes of
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Katherine Proctor June 01, 2020



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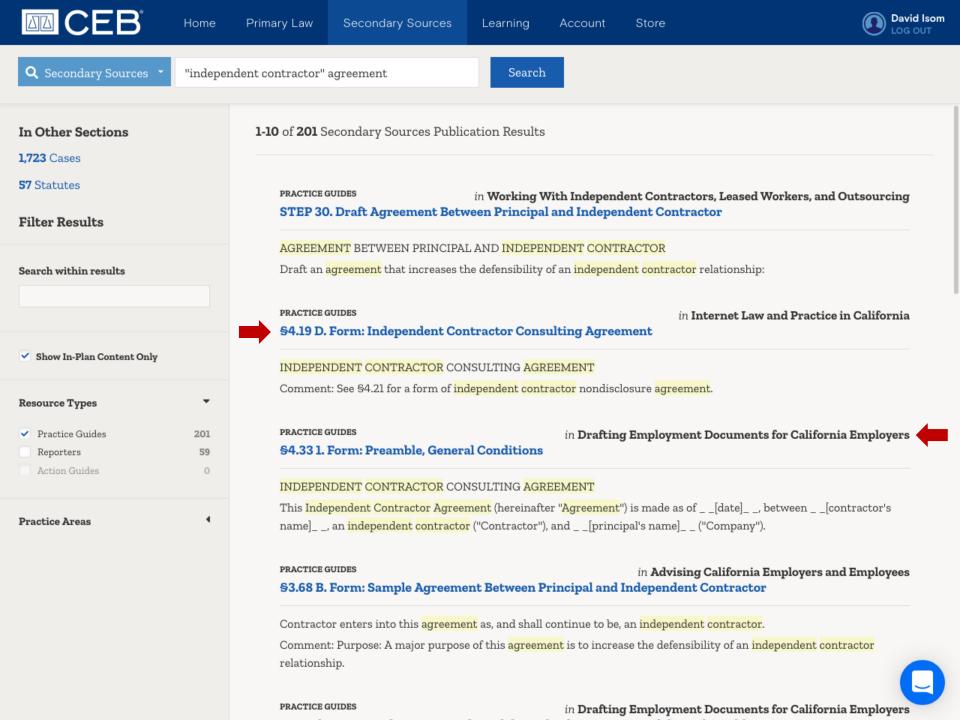
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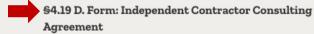
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INDEPENDENT CONTRACTOR CONSULTING AGREEMENT

This Independent Contractor Consulting Agreement (this "Agreement") is made as of _ _[date]_ _, between _ _[name of company]_ _, a _ _[specify entity, e.g., California corporation]_ _ ("Company"), and the person or entity identified as "Consultant" on the signature page of this Agreement ("Consultant").

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. SERVICES. Company hereby retains Consultant to perform the following services (the "Services"): _ _[List or describe services as specifically as possible. The services can be more specifically described in an attached exhibit if necessary.]_ _

Comment: The description of the services should be as precise as possible and should avoid the use of general terms such as "and such other services as may be added from time to time" or "such services as directed by the appropriate employees of Company" to lessen the risk of potential reclassification of the independent contractor as an employee.

2. TERM. The term of this Agreement shall begin on the date first set forth above and shall continue until _ _[ending date of term]_ _ (the "Term"), unless earlier terminated as provided for herein.





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- ▶ California Wage and Hour: Law and Litigation
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- ▶ Employment Damages and Remedies
- ▶ Handling a Wrongful Termination Action
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- Wrongful Employment Termination Practice: Discrimination, Harassment, and Retaliation

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4 Independent Contractors



\$4.1 I. INTRODUCTION TO INDEPENDENT CONTRACTORS

In California, a person who performs services for compensation for another (the principal) can be either an employee or an independent contractor. The principal-independent contractor relationship differs in both nature and consequences from an employer-employee relationship. An employer has certain control rights and a multitude of obligations regarding an employee that are not part of a principal-independent contractor relationship. Further, although employees are entitled to a variety of benefits and protections afforded by various laws, such as unemployment benefits, workers' compensation, and unpaid leave, independent contractors are not entitled to any such benefits based on the performance of services for the principal.

Whether a person is an employee or independent contractor is determined under three primary tests: the common law control test (see §\$4.2–4.3), the ABC test (see Dynamex Operations W. v Superior Court (2018) 4 C5th 903), and the economic realities test (see §\$4.4–4.5). The common law control test (also referred to as the usual common law rules) is used for federal and state tax purposes as well as for statutes that do not expressly apply a different standard. The ABC test is used for wage and hour claims in California courts. The economic realities test is used for most federal employment laws that are intended to protect workers' rights, such as the Fair Labor Standards Act of 1938 (FLSA) (29 USC \$\$201–219) and the Family and Medical Leave Act of 1993 (FMLA) (29 USC \$\$2601–2654), or laws intended to prevent discrimination, such as Title VII of the Civil Rights Act of 1964 (42)





BOOKS & TREATISES

Books



Kenneth A. Adams, *A Manual of Style for Contract Drafting* (4th ed. 2017); LRC Reading Room <u>KF807 .A33 2017</u>

Lenné Eidson Espenschied, *Contract Drafting: Powerful Prose in Transactional Practice* (3d ed. 2019); LRC Reading Room <u>KF807</u>. <u>E84 2019</u>

George W. Kuney & Donna C. Looper, *Legal Drafting in a Nutshell* (4th ed. 2016); LRC Reference Reserve Materials <u>KF250 .343</u> 2016; also available electronically via <u>West Study Aids</u>

Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed. 2014); LRC Reserve Study Aid KF807 .S73 2014

Treatises and practice guides



David C. Burgess et al., *Drafting Business Contracts: Principles, Techniques, & Forms* (revised 2019); LRC Reading Room <u>KF801</u>. <u>D72</u>; also available electronically via <u>CEB OnLaw Pro</u>

Robert A. Feldman & Raymond T. Nimmer, *Drafting Effective Contracts: A Practitioner's Guide* (2019, Westlaw)

Vladimir R. Rossman & Morton Moskin eds., Commercial Contracts: Strategies for Drafting & Negotiating (2020, Westlaw)

Peter Siviglia, Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating (2019, Westlaw)

Tina L. Stark ed., Negotiating and Drafting Contract Boilerplate (2019, Lexis)

Final thoughts



- Don't start from scratch—there are many resources that can provide starting points
- Google is not a great starting point for contract drafting
- Contact a reference librarian for help

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